IN THE

Supreme Court of the United States

No. 9—October Term, 1951

DONALD R. DOREMUS and ANNA E. KLEIN,

Appellants,

vs.

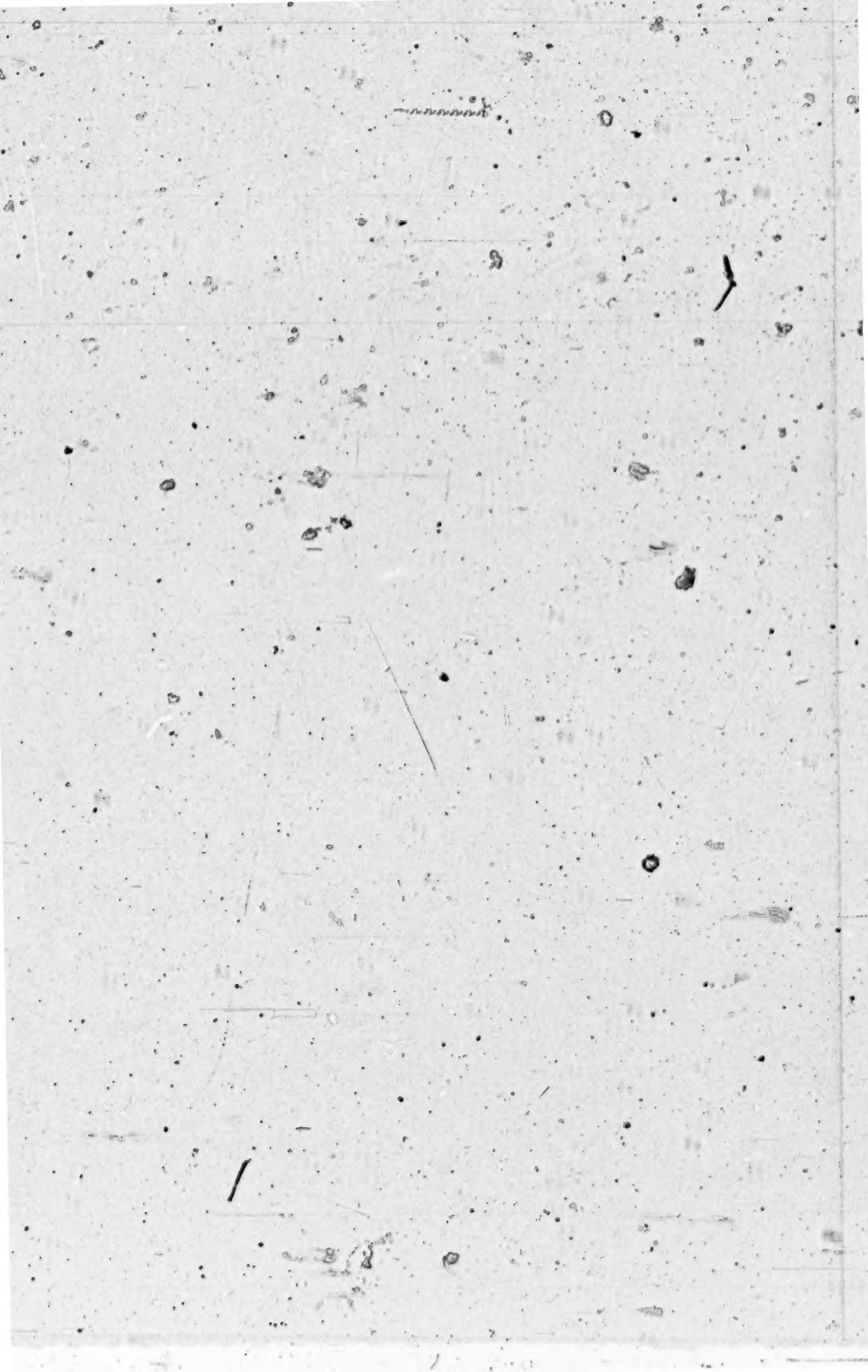
BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE and THE STATE OF NEW JERSEY,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey

BRIEF FOR APPELLEE BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE

Alexander E. Fasoli,
Henry F. Schenk,
Counsel for Appellee Board of Education of the Borough of Hawthorne,
51 Hamilton Street,
Paterson, New Jersey.



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UNITED STATES:

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Opinions Below

The opinion of the Supreme Court of the State of New Jersey (R22-38) is reported at 5 N. J. 435, 75 A. 2d 880. This opinion affirmed a decision of the Superior Court of the State of New Jersey, Law Division, whose opinion (R7-16) is reported in 7 N. J. Super. 442, 71 A. 2d 732.

Jurisdiction

The judgment and mandate of the Supreme Court of New Jersey was entered on October 16, 1950 (R21). An order allowing appeal to the Supreme Court of the United States was made by Mr. Justice BURTON on January 12, 1951 and filed January 19, 1951 (R38). A Statement as to Jurisdiction having been filed with this Court in accordance with Rule 12, on March 12, 1951, this Court made its order in which further consideration of the question of jurisdiction of this Court and of the motion to dismiss or affirm was postponed to the hearing of the case on the merits (R43).

Statutes Involved

The Statutes involved are Revised Statutes of New Jersey (1937) 18:14-77 and 18:14-78.

R. S. 18:14-77 provides:

> "At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in

which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R. S. 18:14-78 provides:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

The First Amendment to the United States Constitution provides in part:

"I. Congress shall make no law respecting an establishment of religion, or prohibiting the free excise thereof; ****"

The Fourteenth Amendment to the United States Constitution provides in part:

"XIV. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of Life, Liberty, or Property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Counter-Statement of Questions Presented

1. Have Appellants in this cause suffered injury sufficient to permit them to maintain this action and, if so, are they estopped by their acquiescence in the practices complained of?

2. Whether Title 18, Chapter 14, Section 77 of the Revised Statutes of New Jersey, which in substance requires the daily reading of a portion of the Holy Bible known as the Old Testament, without comment, in each public school classroom or public school assemblage, of the State, is repugnant to the First and Fourteenth Amendments of the United States Constitution?

3. Whether Title 18, Chapter 14, Section 78 of the Revised Statutes of New Jersey, which permits the repeating of the Lord's Prayer and the reading of the Bible in the public schools of the State, is repugnant to the First and Fourteenth Amendments of the United States Constitution?

Counter-Statement of Facts

The statement of facts set forth in Appellants' brief AB-4) is substantially correct. However, Appellee, Board of Education wishes to bring to the Court's attention that the daughter of Appellant, Anna E. Klein, is no longer a student in the public schools of the Appellee, she having graduated therefrom.

Appellee Board of Education, wishes to further stress that the question of constitutionality under the First and Fourteenth Amendments of the United States Constitution was not the sole issue below, but Appellees, jointly argued that the Appellants were without legal standing to press their claim; that Appellants were estopped; that Appellants had waived their rights; and that the long existence of the statutes in question, without challenge, had estabilshed their validity. In fact, the New Jersey Supreme Court speaking through CASE, J., stated that the points had substance but the Court nevertheless concluded to dispose of the appeal on its merits (R24-25).

Summary of Argument

The law is well settled that a mere citizen having no interest in the validity of a law beyond that of other citizens and not professing to sue on behalf of others, may not raise the question of the constitutionality of a statute. One who is a taxpayer, as such, may not question the constitutionality of a statute which does not affect him.

Appellants allege their status as citizens and taxpayers but have failed to show that as citizens they have been injured, that as taxpayers they have been injured or that as citizens and taxpayers they have been injured. They merely allege a certain state of facts, admitted by the Appellees, but have failed to prove, that predicated upon these facts they have suffered any injury or have been deprived of any property right or of any liberty, by virtue of their subjection to the questioned statutes.

With respect to Appellants' contention that their consciences are being violated by forced exaction of taxes for the support of religion to which they conscientiously object; they refer to no specific tax but rather to an unmeasured use of tax funds and fail to show that such use of tax funds impairs the ability of the Appellants to practice their conscientious belief. Whether they object as believers or non-believers and to what extent and in what manner they have suffered injury is not revealed or proved.

As a nation, we are unquestionably religious in character, and being so, it was never the intention of Congress or the people of the nation, themselves, to strip the government of non-sectarian recognition of God. The so-called wall of separation was never intended to be built so high and so wide as to exclude the non-sectarian recognition of God in public transactions and exercises inclusive of which is bible reading, without comment, and the repeating of the Lord's Prayer by students, in the public school systems.

The reading of the Bible without comment and the repeating of the Lord's Prayer are not religious exercises, services, or instruction, within either the lay or legal definition of such. The statutes under examination do not compare with the definitions. The statutes do not require or for that matter, even permit the essential elements of, comment, demonstration, examination or meaningful manifestation. They are completely void of such. The very elements necessary to reflect a religious service or the giving of religious instruction are lacking.

Nor do the practices complained of violate Appellants' freedom of conscience and their religious liberty. Their argument to the contrary, fallaciously assumes that "freedom of conscience" and "religious liberty" are identical legal concepts, of course they are not.

ARGUMENT

POINT I

Appellee, Board of Education of the Borough of Hawthorne incorporates herein by reference and makes a part hereof the entire argument set forth in Appellee's statement opposing jurisdiction and motion to dismiss or affirm, filed in the cause and which is designated as No. 556, October Term, 1950.

On March 2, 1951, Appellee Board of Education of the Borough of Hawthorne, together with Appellee, the State of New Jersey, filed a statement opposing jurisdiction and a motion to dismiss or affirm, with the Clerk of the United States Supreme Court.

On March 12, 1951, Appellees received notice that the United States Supreme Court had postponed further con-

sideration of the question of the jurisdiction of the Court and of the motion to dismiss or affirm, to the time of the hearing of the cause on the merits.

Appellee Board of Education of the Borough of Hawthorne, therefore, vigorously presses this point as the first point of its argument, herein.

POINT II

Non-sectarian recognition of God by the State in public transactions and exercises is not prohibited by the First and Fourteenth Amendments to the Constitution of the United States.

The First Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment (*Everson* v. *Board of Education*, 330 U. S. 1, 8, 91 L. Ed. 711, 719, 67 S. Ct. 504 (1947); *McCollum* v. *Board of Education*, 333 U. S, 203, 210, 92 L. Ed. 649, 658, 68 S. Ct. 461 (1948)), prohibits any aid to, or support of, churches, religious sects, denominations, creeds, doctrines, tenets, dogmas and modes of worship of any church or sect, but does not prohibit government recognition of God in public transactions or exercises.

Recognition by the State of belief in God by the people is not repugnant to any constitutional guaranties of freedom of conscience, freedom of worship, free pursuit of religious beliefs, or freedom from religion. *Lewis* v. *Board of Education*, 157 Misc. 520, 285 N. Y. S. 164 (1935), modified in other respects in (1935), 247 App. Div. 106, 286 N. Y. S. 174, rehearing denied in (1936) 247 App. Div. 873, 288 N. Y. S. 751, appeal dismissed in (1937) 276 N. Y. 490, 12 N. E. (2d) 172.

At the time of the adoption of the Constitution of the United States and the First Amendment thereof, the general, if not the universal, sentiment in America was that a solemn recognition of a superintending Providence in public transactions and exercises is not contrary to the American philosophy of government.

The Mayflower Compact (signed in 1620 in the cabin of the Mayflower), which John Quincy Adams called "the only instance in human history of that positive, original social compact which speculative philosophers have imagined as the only legitimate source of government * * * a unanimous and personal assent by all the individuals of the community" (The American Canon, by Daniel L. Marsh, President of Boston University, published in 1939, by Abingdon Press, New York, p. 18), was made "in the name of God" and it declared that the Colony of which it was the instrument of government was founded "for the glory of God" (American Canon, p. 126).

The Declaration of Independence, which is one of those "organic utterances" which "speak the voice of the entire people" *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 470, 36 L. Ed. 226, 232 (U. S. Sup., 1892), and which is the organic utterance which made us a nation, completely dispells any notion that State recognition of God is not imbedded in our whole concept or philosophy of government. It mentions God four times. In the first paragraph, it declares that it has become necessary for the people of the colonies "to assume among the powers of the earth the separate and equal station to which the laws of Nature and of Nature's God entitle them," thus basing their action upon the laws of God. In the second paragraph, it is recognized that our liberties were derived from God, who "endowed" all men "with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." In the last paragraph, Congress appeals to God as

the "Supreme Judge of the world for the rectitude of our intentions" in declaring "that these United Colonies are, and of Right ought to be Free and Independent States." Also in the last paragraph, it is stated that the Declaration, which made us a nation, is made "with a firm reliance on the Protection of Divine Providence."

The First Amendment to the Constitution of the United States, when read in the light of the Declaration of Independence, was not intended to prohibit the reading, in public exercises, of the Book which contains the basis for our concept of civil and religious liberty and which sets forth "the Laws * * * of Nature's God," or to prohibit prayer, in public exercises sponsored by government, to the Supreme Being in reliance upon whose protection this nation was created.

In the convention at Philadelphia which drafted the Constitution of the United States, Benjamin Franklin, addressing George Washington, President of the convention, said:

> "I have lived, sir, a long time, and the longer I live, the more convincing proofs I see of this truth: That God governs in the affairs of men. And if a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid?
>
> "We have been assured, sir, in the sacred writings, that 'except the Lord build the House they labor in vain that build it.' I firmly believe this; and I also believe that without His concurring aid we shall succeed in this political building no better than the builders of Babel. We shall be divided by our little partial local interests; our projects will be confounded, and we ourselves shall become a reproach and byword down to future ages. And, what is worse, mankind may hereafter from this unfortunate instance, despair of establishing governments by human wisdom and leave it to chance, war, and conquest.

"I therefore beg leave to move that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the clergy of this city be requested to officiate in that service." (American Canon, p. 43.)

George Washington's Farewell Address to the people of the United States, which is described by some writers as the last will and testament of the Father of his Country to his country, contains the following paragraphs:

"Of all the dispositions and habits, which lead to political prosperity, Religion and Morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens. The mere Politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connexions with private and public felicity. Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? *And let us with caution indulge the supposition, that morality can be maintained without religion.* Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both *forbid us to expect, that national morality can prevail in exclusion of religious principle.*

"It is substantially true, that virtue or morality is a *necessary spring of popular government.* The rule, indeed, extends with more or less force to every species of free government. Who, that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric?"

The third verse of the Star Spangled Banner, our National Anthem, contains the following words:

> "Blest with vict'ry and peace, may the heav'n rescued land Praise the Pow'r that hath made and preserv'd us a nation! Then conquer we must, when our cause it is just, And this be our motto: 'In God is our Trust.'"

All our history, from the signing of the Mayflower Compact to the adoption of the First Amendment, and from the adoption of that Amendment to the present time, is replete with evidence that "this is a religious nation." The American "organic utterances" which "speak the voice of the entire people affirm and reaffirm that this is a religious nation," that we, as a nation, believe in God and that our nation was established with a firm reliance on God. *Church of the Holy Trinity*, v. *United States, supra; Lewis* v. *Board of Education, supra.*

In Cooley's Constitutional Limitations, Eighth Edition (1927), Volume II, page 974, it is stated that:

> "But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper infinite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, of bowing in contrition when visited with the penalties of His broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government."

The oath of allegiance of those required by law to give assurance of fidelity and attachment to the Government of New Jersey ends with the words "*So help me God,*" (R.S. 41:1-1.) The oath required of public officers terminates the same way (R.S. 41:1-3). These oaths are taken with hand on the scriptures (R.S. 41:1-4) and with uplifted hand and "*swearing by the ever-living God*" (R. S. 41:1-5). In order to dispense with the necessity of an oath a person must allege that he is conscientiously scrupulous of taking an oath and it must appear that the person is one entitled by law to affirm in lieu of an oath.

State v. *Harris*, 7 N. J. L. 361 (N. J. Sup., 1800);
State v. *Fox*, 9 N. J. L. 244 (N. J. Sup., 1827).

The rare exception is therefor the affirmation and even here one of the alternatives mentions the "presence of *Almighty God.*" (R.S. 41:1-6.)

The oaths required of Court officers and witnesses refer to the presence of "*Almighty God*" (except for the rare case of affirmation) Cf. R.S. 2:32-111; 2:32-114.

The statutes, definitions, and the First Amendment itself above referred to clearly disclose the recognition of the fact that in its entirety our nation is one composed of "God fearing people" and predominantly a "believing" nation with respect to a Supreme Being.

An examination of the authorities reveals that the State of Pennsylvania has a statute akin to the statutes of New Jersey. That particular statute known as the Act of May 20, 1913, Pennsylvania Public Laws 226, states under Section 1:

> "Be it enacted that at least 10 verses from the Holy Bible shall be read or caused to be read without comment at the opening of each and every public school upon each and every school day by the teacher in charge."

It was determined that this statute was enacted by the Legislature in the interest of good moral training and of good citizenship to bring to the attention of public school children the fundamental lessons of morality. This particular premise received early recognition in the case of *Commonwealth* v. *Wolff*, 3 S. & R. 48, wherein the Court said:

> "Laws cannot be administered in any civilized government unless the people are taught to revere the sancity of an oath and look to a future state of rewards and punishments for the deeds of this life."

Such legislative thinking makes it more obvious that the statutes such as those in question were not promulgated and passed specifically with religious intent but on the contrary were passed with the thought of *basically inculcating good citizenship and good moral training.*

That we are fundamentally a religious people, is beyond dispute. An excellent review of the American organic utterances which speak the voice of the entire people, and which affirm and re-affirm that this is a religious nation, appears in *Church of the Holy Trinity* v. *United States*, 143 U. S. 457.

The pertinent excerpts of this momentous decision were recognized and incorporated in the memorandum of Decision of the New Jersey Superior Court, Law Division, by DAVIDSON, *J.*, filed February 23, 1950, which Appellee Board of Education of the Borough of Hawthorne, incorporates herein by reference and makes a part hereof. (R9-15) Through such thorough historical analysis it becomes most obvious that the Congress which submitted the Constitutional Amendments to the people, and the very people themselves in adopting the amendments, never intended the prohibition of nonsectarian recognition of God by the State in public transactions.

In the *Everson* case Justice BLACK said that "these words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out." Continuing, he said that whether the New Jersey law authorizing use of public funds for transportation of children to private schools, including sectarian schools, "is one respecting an 'establishment of religion' requires an understanding of the meaning of that language" and, therefore, he deems "it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted." (330 U. S. 8)

His review of that period (330 U. S. 8 to 13, incl.) shows that the following were the evils which were intended to be stamped out by the First Amendment: "Bondage of laws which compelled them to support and attend *government favored churches.*" "Turmoil, civil strife, and persecutions, generated in large part by *established sects*" (300 U. S. 8). "Power of government supporting" *sects.* "In efforts to force loyalty to whatever *religious group* happened to be on top and *in league with the government* of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed." Those punishments had been inflicted for "such things as speaking disrespectfully of the views of ministers of *government-established churches,* non-attendance at those churches, expressions of nonbelief in *their doctrines,* and failure to pay taxes and tithes to support them" (330 U. S. 9). Compulsion "to pay tithes and taxes to support *government-sponsored churches,* whose ministers preached inflammatory sermons designed to strengthen and consolidate the *established faith* by generating a burning hatred against dissenters" (330 U. S. 10).

Justice BLACK concludes this list of evils, intended to be stamped out by the First Amendment, with the statement that:

> "These practices became so commonplace as to shock the freedom-loving colonists into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. *It was these feelings which found expression in the First Amendment.*" (330 U. S. 11).

Every one of the evils recited by Justice BLACK arose from government aid to "religious groups * * * in league with the government," "churches," "sects," "established faiths" and "doctrines." Not one of them arose from nonsectarian recognition of God by government "in public transactions and exercises," such as "opening legislative sessions with prayer or the reading of the Scriptures."

Cooley's Constitutional Limitations, Eighth Edition (1927), Volume II, pages 974-975.

Justice BLACK cited (330 U. S. 15, note 21) the case of *Reuben Quick Bear* v. *Leupp* (*supra*), 210 U. S. 50, in which it was indicated that "the government is necessarily *undenominational* as it cannot make any law respecting an establishment of religion." He also cited (330 U. S. 15, note 21) the case of *Davis* v. *Beason* (*supra*), 133 U. S. 333, in which it was said that "the First Amendment was intended * * * to prohibit legislation for support of any religious *tenets*, or the modes of worship of any *sect*."

Every session of Congress, from the First Congress to the present Congress, has been convened with prayer.

James Madison was a member of the congressional committee which planned the chaplain system of Congress.

Reports of Committees of the House of Representatives, Vol. II, No. 124.

The First Congress passed an act for the raising of a regiment of troops, which provided for the appointment and pay of a regimental chaplain.

Act of March 3, 1791, 1st Congress, 3rd Sess., 1 Stat. 222.

Non-sectarian recognition of God by government in the United States, from time immemorial, not only in "organic utterances" which "speak the voice of the entire people," and usages and customs of the people, but by legislation adopted by the First Congress and by State Constitutional provisions, as well as continuous practical construction given to the First Amendment by Congress and the Chief Executive for over a century and a half, is conclusive that the authors of the Bill of Rights had no intention to prohibit non-sectarian recognition of God by the State. There was "no intention of disregarding" such recognition of God as an exception to the First Amendment, "which continued," in law and in practice, "to be recognized as if" it "had been formally expressed."

Such statutes as those under examination are but a governmental recognition of a Supreme Being and are predicated upon the desire to create and perpetuate a sense of good moral being for the benefit of the majority, and thus obviously do the greatest good for the greatest number. It certainly was not the intention of our Constitutional framers that narrow construction be given to the Constitution or any of its amendments, in such matters, especially where the Constitution itself is predicated upon the theory of "the most good for the most people."

POINT III

The reading of the Bible and the reciting of the Lord's Prayer in the public school systems are not religious services and exercises, and religious instruction contrary to or within the contemplation of the First and Fourteenth Amendments of the United States Constitution.

The word "religion" as used in the constitutional sense, means a particular system of faith and worship, recognized and practiced by a particular church, sect or denomination. It is a term referring to one's views of his relations to his Creator and to the obligations they impose of reverence for His being and character and of obedience to His will. The term is often confounded with a "cultus" or form of worship of a particular sect, but is to be distinguished from the latter. *Reynolds* v. *U. S.*, 98 U. S. 149, 25 L. Ed. 244; *Davis* v. *Beason*, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637; *Board of Education* v. *Minor*, 23 Ohio St., 241, 13 Am. Rep., 233; *Taylor* v. *State*, 11 So. 2d 663; *Gabrielli* v *Knickerbocker*, 82 P. 2d 391.

The term "religious instruction" supposes the furnishing of an outline, reading of papers, setting of examinations and determining credit to be given for the study of historical, biographical, narrative and literary features of the Bible. *State* v. *Frazier*, 173 P. 35, 102 Wash. 369, L. R. A. 1918 F. 1056.

Through the very wording of the State statutes under examination, it is obvious that the intent and spirit of the legislature of the State of New Jersey was to avoid that which may be definitively called an "exercise," "service" or an "instruction in religion."

To constitute a "service," the statutes would have compelled the use of a sectarian version of the Bible. One

teaching a particular dogma of a sect. The statutes would have compelled definite, overt, participatory acts, required of the students assembled. Specific, meaningful manifestations, would have been required, commanding the student's response to an arranged religious pattern.

To constitute "religious instruction" the statutes would have made provision for the explanation of the biblical passages read. Specific comment thereon, would be in order. Overt demonstration, to inculcate and impress a particular dogma or belief would be necessary. Objective and subjective approaches to the matter would of necessity be a part of such instruction.

Of all this the Statutes are completely void. The very elements necessary to reflect a religious service or a religious instruction are lacking.

As to that particular statute, New Jersey Revised Statutes 18:14-78, which prohibits any "religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer * * *," it is most obvious that the New Jersey Legislature recognized that the reading of the Bible, and the repeating of the Lord's Prayer, were in themselves void of the elements of a religious exercise, or the giving of religious instruction, that they were specifically excluded from other religious manifestations that would smack of religious exercise and instruction. The Legislature impliedly stated "No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer (which of themselves by their very nature are neither a religious service or exercise but rather a governmental recognition of a Supreme Being) shall be held in any school etc. * * *"

To teach, it is necessary to impart knowledge or information by means of lessons; give instruction to. Thus teaching of religion, in its generally accepted meaning,

would require an imparting of knowledge of religious tenets, dogma and creed. It would demand a giving of specific instruction of a tenet, dogma or creed. A mere reading from the Bible, particularly without comment, therefore cannot be called sectarian teaching.

Teaching, or serious endeavor to inculcate a religion, or concept thereof, through the mere reading of a passage or scripture, is highly improbable. Religion is far too complex. It is one of the most complex and actually least understood subjects in the world today. It is certainly the least definite. Thus if religion be so complex, how then can it be insisted that a particular dogma or creed can be inculcated in one's mind, even the most receptive mind, through a limited reading of a biblical passage, without any comment thereon.

So generally common is the connotation of Bible reading, without comment, and the repeating of the Lord's Prayer, that Appellees believe this Court can take judicial notice that such are not religious exercises in themselves.

POINT IV

Bible reading and the recital of the Lord's Prayer in the public schools of New Jersey do not infringe plaintiff's freedom of conscience nor violate the concept of religious liberty.

In effect appellants argue that the practices complained of constitute a violation of their freedom of conscience and consequently, of their religious liberty. This is, of course, the standard argument of those who are opposed to organized religion. The fundamental error in this argument is in the fallacious assumption that *freedom of conscience* (freedom to believe) and *religious liberty* (freedom to act) are identical legal concepts. They are different. Freedom

of conscience embraces the right to hold particular religious convictions whereas religious liberty involves the right to act in accordance with religious beliefs.

Freedom of conscience is absolute insofar as the State is concerned, but religious liberty is relative, since the rights of other members of society must be considered. The Mormons believe in polygamy but under the Constitution they cannot practice it.

That this is the proper approach is demonstrated by the language of Mr. Justice BLACK and Mr. Justice DOUGLAS in their concurring opinion in *Barnette* v. *West Virginia*, *supra*. They said at page 643:

> "No well ordered society can leave to individuals an absolute right to make final decisions, unassailable by the State, as to everything they will do or will not do. The First Amendment does not go that far."

The case of *Hamilton* v. *University of California*, 293 U. S. 245 (U. S. Sup., 1934) is particularly apropos on this point. In that case the appellants, who had a conscientious objection to war and all matters relating to it, claimed exemption from the required Reserve Officers Training Corps training at the University. Mr. Justice CARDOZO in his concurring opinion made the following observation at page 268:

> "The conscientious objector, if his liberties were to be thus extended might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, *or in furtherance of any other end condemned by his conscience as irreligious or immoral.* The right of private judgment has never been so exalted above the powers and compulsions of the agencies of government."

That decision demonstrates clearly that freedom of conscience and religious liberty are not the same thing. Ob-

viously and admittedly participation in the military training course was counter to the conscientious beliefs of the objectors. Therefore, the decision was based not on that, but on the "religious liberty" of the objector, *i.e.*, the *exercise* of religious belief. This latter involves the interest of the State as distinguished from the absolute freedom of conscience of the individual.

In the *Barnette* case, *supra*, Mr. Justice FRANKFURTER said in his dissenting opinion (page 659):

> "* * * the religious consciences of some parents may rebel at the absence of bible reading in the schools."

In the case at Bar, the very fact that the State of New Jersey is an active participant demonstrates that it is representing "society" in the matter. The Legislature is, in the last analysis, the formulator of the public policy of the State and in that capacity it has seen fit to adopt the two statutes here under attack. They have been on the books for many, many years without challenge (1903-1916). They have over that long period of time been accepted by society as being in conformity with the basic law of the land, the Constitutions—both Federal and State.

A decision for the appellants in this case would of necessity mean that this Court feels *religious liberty* (freedom to act) has the same absolute quality as *freedom of conscience* (freedom to believe). In view of the above discussion, we urge that that is not the fact.

CONCLUSION

In *abstractum*, the sum and substance of Appellants' contention and argument, is that the reading of the Old Testament of the Holy Bible, without comment, and the repeating of the Lord's Prayer, in the public school classrooms, infringes their constitutional rights.

It is all too apparent that Appellants have concerned themselves with their interpretation of the constitutional rights of the individual and have overlooked, perhaps conveniently, the obligations of the individual respecting these rights particularly as to others.

These constitutional freedoms are approached in a favorable light in justification of an alleged personal freedom, and again, these very freedoms and guarantees are conveniently ignored and denied to others who seek to avail themselves of the general application and meaning of such liberties.

The wall of separation of Church and State, as generally defined, accepted and understood, is altered, in part, to conform with an individualistic thought. Through strained and rather limited presentation of such thought, the wall is made to separate that which was not intended to be separated.

With respect to education, the wall of separation prevented the expenditure of public funds for the establishment, maintenance and support of religious schools, and to further prevent religious instruction, in the strict sense, from being given in the public schools. It was never intended to prevent the recognition of a Superior Being; for such recognition does not constitute religious instruction, but is rather a tolerant recognition, of a supreme or superior force, adhered to in belief by the majority of the peoples of this great nation.

Surely the wall of separation metaphor has great merit, but the wall should not be built so as to shut out the light of reason. Perhaps it may be said that the wall of separation casts shadows in the direction of governmental recognition of a Supreme Being; but are not public safety and morals endangered if we remove all of that which purports to be religious?

Can it not be said that the building of the wall of separation, so high and so wide as to negate the slight governmental recognition of a Supreme Being, and further prevent the reading of the Bible, without comment, in the public school systems, is an admission of Atheism as against Theism. Are not those who believe in some sort of Superior Force and Supreme Being, anthropomorphic or otherwise, being denied of their Constitutional rights, in a nation so christian in character, as ours. Appellants basically seek to deny the majority of peoples the right of governmental recognition of a Supreme Being. For if such recognition be wrong in the public school systems, it is most certainly so in every other public aspect. If it be denied in the public school systems, it most certainly should be denied in every other public function.

It is therefore, respectfully submitted that New Jersey Revised Statutes 18:14-77 and 18:14-78 are Constitutional, that appellants herein have no standing to press their claims and that the judgment of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

ALEXANDER E. FASOLI,
HENRY F. SCHENK,
Counsel for Appellee Board of Education of the Borough of Hawthorne.